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No. 01-682

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Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA MUNICIPALITIES, STATE MUNICIPALITIES, AND THE FLORIDA LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

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Amici have a compelling interest in the legal question presented by the appeal herein. Any punitive damages

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

award imposed against a municipality would have to be paid with limited municipal financial resources. Such payment would require the municipality to divert funds, in an amount limited only by the unpredictable restraint or generosity of a jury, from municipal programs, services and activities, all at the expense and to the detriment of innocent municipal taxpayers and residents.

I.
SUMMARY OF ARGUMENT

This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has confirmed the following well-settled rule, followed by a majority of state and federal courts and expressly enacted by several states: in general, punitive damages awards cannot be imposed against municipalities. Erroneously relying on the holding in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Eighth Circuit below has diverged from precedent established by this Court and by lower federal courts, including the Eighth Circuit itself, which prohibits the award of punitive damages against a municipality.

The remedy of punitive or exemplary damages is additional to compensation and other relief. The historic use and the purpose of such a remedy is revealed in the name, that being to punish the wrongdoer and to make an example that will deter subsequent similar acts by the wrongdoer or others who might be inclined to engage in such misconduct. The common law proscribing punitive damages awards against municipalities has largely remained intact, with only limited statutory exceptions. Over the years, important public policy considerations

have restrained judicial creation of punitive damage remedies against municipalities. The lack of any expression of legislative intent to allow punitive damages awards against municipalities under either the Americans with Disabilities Act or the Rehabilitation Act of 1973 indicates that Congress did not intend to deviate from the well-founded public policy prohibiting such awards.

Punitive damages is an inappropriate remedy when the tortfeasor is a municipality rather than an individual wrongdoer. Such an award must necessarily be paid from the public funds of the municipality. The pain of a punitive damages award against a municipality is felt no more keenly by the malfeasant public official than by any other resident of the community, and a public official residing outside of the community exposed to punitive damages may not feel the pain of the punitive damages award at all. Given the length of time likely to elapse between an injury and the ultimate imposition of a punitive damages award, the official may, by that time, no longer retain his or her official position nor continue to reside in the community.

As the official is not effectively punished by the award, there is no sound basis to conclude that the punitive damages award would effectively deter the official's repetition of the offending act. Any deterrent effect on the municipality itself is extremely attenuated and only incremental, as the municipality is already punished by payment of compensatory damages and other costs incurred due to the acts of the errant official. Because a punitive damages award against a municipality cannot fulfill the purposes of punitive damages to punish and deter, its selection as a remedy would be fundamentally unsound.

An award of compensatory damages for the conduct would provide sufficient incentive for the municipality to take appropriate punitive action against the offending official. Moreover, the municipality has at hand more effective means to punish the offending public official and deter similar acts by the official or others, by its authority to discipline or to remove the official from office. The democratic election process and the close scrutiny commonly applied by the press to public officials and their actions also provide meaningful checks on, and deterrents against, officials' misconduct. In addition, an award against the individual municipal official would serve the punitive and deterrent purposes of a punitive damages award much more effectively than an award against the municipality.

A municipality required to pay a punitive damages award would be exposed to essentially unlimited liability, which could result in a financial burden of ruinous proportions for communities across the nation. The "deep pocket" perception with which a jury would be tempted to view the taxing authority of a municipality would surely lead to instances of unwarranted substantial awards requiring reduction or cessation of desirable, beneficial and necessary municipal services. It would be imprudent to rely on juries to strike the proper balance between the desire to impose punitive damages and a municipality's financial ability to pay such an award. One reason is that jurors, especially in federal courts, are likely to be drawn from outside the municipality and to have little motivation to give due consideration to the municipality's financial limitations.

A $1.2 million punitive damages award such as was rendered by the jury in this case, while substantial in any event, in the case of a smaller municipality could be catastrophic to every resident who relies on the municipality for basic public services. Fearing such adverse consequences, municipalities would be unduly pressured to settle and pay questionable claims. For their financial protection, municipalities would have to consider prospective reduction or curtailment of public programs and services, possibly choosing the safer course of simply not offering some programs or services at all, rather than risking punitive damages awards for any alleged misconduct in their implementation.

The unavailability of liability insurance to cover punitive damages awards, due to proper public policy concerns expressed by several courts, would expose the entire array of municipal services to forfeiture under an obligation to pay punitive damages. Neither would establishment of a municipal reserve fund to pay prospective punitive damages offer a realistic solution. A reserve could be established only by anticipatory defunding of programs and services, and its existence would then simply raise the bar for determination of an award amount sufficient to inflict the pain that is necessary to effective punishment. Thus, establishment of such a reserve would engender a vicious cycle of escalating awards, higher reserves and greater inroads on the municipality's ability to offer programs, services and activities.

Finally, both the Americans with Disabilities Act and the Rehabilitation Act of 1973 provide adequate remedies

and sufficient deterrents, including injunctive relief, compensatory damages and attorney fees. Under these enactments, plaintiffs would not be left without a remedy by the disallowance of punitive damages awards against municipalities. The residents and taxpayers of the municipality are already punished by having to pay compensatory damages and attorney fees for the acts of their public officials and the plaintiff is fully compensated for the injuries suffered. A punitive damages award would unnecessarily harm an adequately punished municipality and would constitute a windfall to the amply compensated plaintiff and his attorney.

II.

ARGUMENT

In *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001), the Eighth Circuit Court of Appeals held that punitive damages may be awarded against a municipality in cases brought under Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12132 *et seq.*; "ADA") and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a); "Rehabilitation Act"). In doing so, the Eighth Circuit disregarded decisions of this Court, as well as prior decisions of its own circuit, which upheld the longstanding rule of law that punitive damages are not recoverable against a municipality. The Eighth Circuit failed to follow "the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine [of municipal immunity from punitive damages].' " *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263, quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Rather, the court, relying upon *Franklin v. Gwinnett County Public Schools*,

503 U.S. 60 (1992), implied the existence of punitive damages as a remedy under Title II of the ADA and Section 504 of the Rehabilitation Act without consideration of applicable precedent on the subject of municipalities' immunity from punitive damages awards. The court's discussion in the case below did not include the peculiar concerns which are implicated in permitting punitive damages to be awarded against a municipality, including the adverse effect on finite municipal budgets and concomitant reduction in municipal services and programs. It also failed to consider the impact of such an award on innocent municipal residents and taxpayers, and the fact that the compensatory objectives of the ADA and the Rehabilitation Act have already been achieved.

1. *CITY OF NEWPORT V. FACT CONCERTS, INC.* STATES THE PROPER RULE OF LAW REGARDING THE RECOVERABILITY OF PUNITIVE DAMAGES AGAINST A MUNICIPALITY, WHICH HAS BEEN FOLLOWED BY A MAJORITY OF COURTS AND IS CONSISTENT WITH VARIOUS STATE STATUTES

A. *Franklin v. Gwinnett County Public Schools* Is Not Controlling

The Eighth Circuit's reliance on *Franklin v. Gwinnett County Public Schools* represents a significant departure from well established authority for the proposition that punitive damages are not recoverable against a municipality in general, nor under Title II of the ADA and Section 504 of the Rehabilitation Act, in particular. *Amici* endorse the petitioners' arguments regarding the lower court's application of *Franklin*, but will not attempt to

duplicate those arguments here. However, *amici* acknowledge that this Court held in *Franklin* that consideration of remedies for an implied right of action in a Title IX case requires a two-part inquiry: first, whether Congress intended to limit the available remedies; and second, which remedies are appropriate. That inquiry led the Court to conclude that compensatory damages offered the appropriate remedy to right the wrong done to Franklin, the other available Title IX remedies of back pay and injunctive relief being ineffective under the circumstances of the case.

Nothing in *Franklin* suggested that Congressional limitation of available remedies could be found only in an express legislative proscription and that all other evidence of legislative intent should be disregarded. Nor did the Court hold that the spectrum of all available remedies could be narrowed, to a selection of those that are appropriate, only by analysis of the specific facts of a case, as the Eighth Circuit has suggested below. Moreover, having resorted to the common law to imply a cause of action and an appropriate remedy for a violation of Title IX (*Franklin*, 503 U.S. at 66-67), the Court undoubtedly did not intend that lower courts should reject immunity doctrines of the same common law when called upon to consider the inapplicability of punitive damages awards to municipalities under the related legislative schemes of the ADA and the Rehabilitation Act.

B. *City of Newport v. Fact Concerts, Inc.* Is The Leading Case On The Question Before The Court, And Bars Punitive Damages Awards Against Municipalities

This Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), clearly states the rule of law applicable in this case. In *City of Newport*, the Court examined what was then a "novel" question (*id.* at 257), whether punitive damages could be awarded against municipalities in actions under 42 U.S.C. § 1983. The Court decisively held that a careful inquiry into considerations of history and public policy compelled a determination of municipal immunity to punitive damages under § 1983. The reasoning and the holding of *City of Newport* remain valid today, undisturbed by the Eighth Circuit below, and apply with equal force to the case at hand.

Despite the current split of authority among several of the circuits,[2] the predominant traditional and current view among federal and state courts has been, and remains, that punitive or exemplary damages are not recoverable against public entities including municipalities, absent express statutory authorization.[3] Annot.,

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[2] See, *e.g.*, *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996); *Pandazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994); and *Doe v. County of Centre*, 242 F.3d 437 (3rd Cir. 2001).

[3] See, *e.g.*, *Eddy v. Miami*, 715 F. Supp. 1553 (1989, S.D. Fla.); *Carpenter v. Dizio*, 506 F. Supp. 1117 (1981 E.D. Pa.); *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858); *Choate v. County of Orange*, 86 Cal. App. 4th 312 (2000); *Columbus v. Myszka*, 246 Ga. 571 (1980); *Wilson v. Eagan*, 297 N.W.2d 146

1 A.L.R. 4th 448 (2001). States such as California, Minnesota, Ohio, Illinois, Alabama, Colorado, Nevada and Pennsylvania, and Puerto Rico, have provided by statute that public entities, including municipalities, are not liable to pay punitive damages awards.[4] Recognizing the challenge recently encountered by the courts in construing *Franklin* and *City of Newport*, one court observed:

> [I]nsofar as the rules of *Franklin* and *City of Newport* conflict, the reasonable way to reconcile them is to give effect to the narrower rule in the latter. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 119 L.Ed. 2d 157, 112 S. Ct. 2031 (1992) (in statutory construction, "the specific governs the general"). After all, the issue here is not the general availability of damage remedies, but rather the specific availability of punitive damages against municipalities. In these circumstances, *City of Newport* tells us to assume that Congress intended to retain common law immunity, unless there is a clear expression of congressional intent to the contrary.

Doe v. County of Centre, 242 F.3d 437, 455 (3rd Cir. 2001).

Of the plethora of cases barring recovery of punitive damages from a municipality, one of the most significant to this appeal is *Kline v. City of Kansas City*, 175 F.3d 660

(1980, Minn.); *Sharapata v. Islip*, 82 App. Div. 2d 350, 441 N.Y.S.2d 275, *affd.*, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1981, 2d Dept.); *Clements v. Airport Auth.*, 69 F.3d 321 (9th Cir. 1995); and *Cole v. Houston*, 442 S.W.2d 445 (1969, Tex. Civ. App. 14th Dist.).

[4] See, *e.g.*, Cal. Govt. Code § 818; Minn. Stat. § 466.04; ORC Ann. 2744.05; 745 ILCS 10/2-102; Code of Ala. § 6-11-26; C.R.S. 24-10-114; Nev. Rev. Stat. § 41.035; 42 Pa.C.S. § 8541, *et seq.*; and 32 L.P.R.A. §§ 3083 and 4705.

(8th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000). The plaintiffs in *Kline* sued defendant Kansas City under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010-213.139 (MHRA), for alleged sexual harassment in the form of intentional discrimination and hostile work environment. The U.S. District Court for the Western District of Missouri had held that punitive damages were not recoverable against the city. Then, just two years prior to its decision in the case below, the Eighth Circuit affirmed, holding that punitive damages were not recoverable against a city in Missouri unless specifically authorized by statute. In its opinion, the Eighth Circuit did not offer any rationale based on the Civil Rights Act, but did expressly conclude that punitive damages were not recoverable against a municipality under the MHRA. The Eighth Circuit reasoned that

> Because the burden of a punitive damages award against a municipality ultimately falls on the taxpayers, and thus will fail to deter future harmful activity by the municipality itself, punitive damages are not usually recoverable against a municipality in Missouri. [Citations omitted.] A municipality in Missouri is subject to punitive damages only if a statute specifically provides that it is.

Kline, 175 F.3d at 669-670, *cert. denied*, 528 U.S. 1155 (2000). In the case below, the Eighth Circuit failed to divulge any reason in support of its determination to abandon the logic articulated in *Kline*.

C. Municipalities' Immunity From Punitive Damages Awards Derives From Fundamental Common Law Principles And Is Undisturbed By Any Applicable Expression Of Legislative Intent

The *Newport* Court delved into the historical details evidencing Congressional intent in enacting § 1983, declaring that:

> The tort liability created by § 1983 cannot be understood in a historical vacuum. . . . Congress . . . expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

City of Newport, 453 U.S. at 258.

The Court understood that the immunities afforded state officials at common law included the historical immunity of municipalities from punitive damages:

> By the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity. But this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation. [Citations omitted.] Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions.

Id. at 259-260.

The Court also observed, "Given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Id.* at 263, citing *Pierson v. Ray*, 386 U.S. 547, at 555 (1967).

The *City of Newport* rationale is no less applicable to the facts at hand, and to claims under Section 504 of the Rehabilitation Act and Title II of the ADA. The Third Circuit Court of Appeals explained this in *Doe v. County of Centre*, 242 F.3d 437 (3rd Cir. 2001). Although finding that the County defendants had unlawfully discriminated against the plaintiffs on the basis of AIDS and HIV, the court held that the principles enunciated in *City of Newport* barred punitive damages against municipalities under Section 504 of the Rehabilitation Act and Title II of the ADA for the same reasons as under 42 U.S.C. § 1983. The court cited the identical public policy considerations and a similar lack of support in the common law or legislative history of the Rehabilitation Act or the ADA for punitive damages awards against municipalities. In

applying the *City of Newport* prohibition of such punitive damages awards, the Court also noted that both "Title II of the ADA and Section 504 of the Rehabilitation Act incorporate by reference the enforcement scheme found in Title VI of the Civil Rights Act of 1964." *Doe v. County of Centre*, 242 F.3d at 457.

The logical foundation of municipal immunity to punitive damages awards shares its basic principles with the established view of punitive damages in agency relationships. Historically, the principal did not bear responsibility in punitive damages for the tortious acts of its agent unless the principal had approved or ratified the malicious intent of the agent:

> The rule is well established that the principal is liable for all actual damage resulting from the malfeasances, negligences or torts of his servant or agent in the course of his employment, subject, however, to the limitation that he is not liable for the torts or negligence of his agent in any matter beyond the scope of his agency unless he expressly authorized them or has subsequently adopted them. "Hence it is," to use the language of Mr. Justice Story, "that the principal is never liable for the unauthorized or willful or the malicious act or trespass of his agent."

Turner v. North B. & M. R. Co., 34 Cal. 594 (1868), quoting Story's Agency, Sec. 456. See also *Wright v. Wilcox*, 19 Wend. 343 (1838); and *Hagan v. Providence & W.R.R.*, 3 R.I. 88 (1854). A police officer is a particular sort of agent of a municipality. The municipality's liability for punitive damages on account of the acts of its officials should be no greater than the liability of any principal for the acts

of its agent, and public policy considerations should further limit the municipality's liability.

D. The Rule Prohibiting Punitive Damages Awards Against Municipalities Is Bolstered By Important Public Policy Considerations, Including The Devastating Impact That Such Awards Would Wreak On Municipalities And Their Taxpayers and Residents

Analysis of public policy considerations confirmed the *City of Newport* Court's conclusion that punitive damages were not allowable against municipalities in § 1983 actions. The Court's own analysis followed the historic rationale that such awards were "contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers." *City of Newport*, 453 U.S. at 263. This view is consistent with the fundamental concept that punitive damages are intended "to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-267, citing Restatement (Second) of Torts § 908 (1979); W. Prosser, Law of Torts 9-10 (4th ed. 1971).

A punitive damages award against a municipality fails to place the intended punishment squarely on the tortfeasor. Instead, the burden is borne by the taxpayers who must pay the award and on the citizens who must forego services made unaffordable by the diversion of taxes to pay the award.

> [Punitive] damages are assessed over and above the amount necessary to compensate the injured party. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

City of Newport, 453 U.S. at 267.

Though declining to disturb settled authority prohibiting punitive damages awards against municipalities, the *City of Newport* Court acknowledged that punitive damages awards may be appropriate for civil rights violations under certain circumstances, against non-municipal defendants. *Id.* at 267-268, citing *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978). The *Carey* Court had limited its recognition of the possible propriety of punitive damages awards to enforcement against individuals and other private entities, citing *Silver v. Cormier*, 529 F.2d 161, 163-164 (10th Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438, 444 n. 4 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573, 576 (5th Cir. 1967); and *Basista v. Weir*, 340 F.2d 74, 84-88 (3rd Cir. 1965). *Carey*, 435 U.S. at 260. The Court's denial of punitive damages against the City of Newport conformed to the general rule that the primary purposes of § 1983 are compensation (including compensation by municipalities) and deterrence, rather than punishment. *City of Newport*, 453 U.S. at 268.

Turning next to the unfitness of punitive damages awards against municipalities to deter wrongdoing, the Court discerned that "the deterrence rationale of § 1983 does not justify making punitive damages available against municipalities." *Id.* at 268. The threat of punitive damages awards based on the perceived wealth of the municipality would be unlikely to deter ill-intentioned officials from wrongdoing. Other consequences, including the compensatory damages available against a municipality, would provide adequate motivation for the municipality to take corrective action, including the discipline or discharge of an offending official. The punitive damages remedy has been determined to be a more effective deterrent when imposed on the offending official, based on his personal financial resources, than the threat of damages against a government employer. *Id.* at 269-270, citing *Carlson v. Green*, 446 U.S. 14, 21 (1980).

The *City of Newport* Court understood the practical implications of creating a punitive damages remedy against municipalities. A municipality already responsible to compensate an injured plaintiff would be exposed to enormous financial risk by the additional imposition of punitive damages. Moreover, determination of the amount of a punitive damages award usually entails consideration of evidence of the tortfeasor's wealth, and

> [T]he unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain

> on local treasuries and therefore on services available to the public at large.

City of Newport, 453 U.S. at 270-271.

In addition, allowance of punitive damages against a municipality would be inconsistent with the widely held doctrine that the interests of public policy forbid insurance against punitive or exemplary damages. *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310 (1999); *City Products Corp. v. Globe Indemnity Co.*, 88 Cal. App. 3d 31 (1979); *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996). The prohibition against insurance for punitive damages is rooted not only in principles of agency, but also in concerns that such insurance would insulate the miscreant insured from the coercive effect of punitive damages, thereby promoting misconduct and reducing the usefulness of punitive damages as a remedy. Substituting "a municipality" for "an insurance company," the same rationale would apply to punitive damages awards against municipalities for the acts of errant public officials:

> The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company [a municipality], punitive damages would serve no useful purpose.

Northwestern National Casualty Company, 307 F.2d at 440.

The mere threat of punitive damage awards, regardless of any actual award, would itself inflict damage on municipalities by motivating municipalities to take protective measures to avoid imposition of punitive damages. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages [citations omitted], the impact of these windfall recoveries is unpredictable and potentially substantial." *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979). In *Foust*, the Court declined to allow the imposition of punitive damages under the Railway Labor Act for breach of a union's duty of fair representation. The Court spoke of the deleterious effect the threat of such an award would have on a union's broad discretion in handling grievances.

> Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members.

Id. at 51-52.

Analogous concerns exist with respect to municipal decision making, and particularly with respect to lawsuits under the ADA and Rehabilitation Act. Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)) prohibits discrimination against the disabled in a "program or

activity" receiving federal financial assistance. The primary substantive provision of Title II of the ADA (42 U.S.C. § 12132) repeats and somewhat broadens this prohibition, precluding discrimination against the disabled in a public entity's "services, programs, or activities," regardless of the funding source.

Without derogating the importance of the ADA and the Rehabilitation Act, those called upon to interpret and apply these acts are confronted by the fact that the legislation is less than clear in delineating the precise conduct to which a public entity is to conform itself. Neither the ADA nor its regulations define what constitutes a "service, program or activity." Though the Rehabilitation Act does define "program or activity" as "all of the operations of [the public entity]," this broad definition and the absence of a definition under the ADA has caused public entities uncertainty over the nature and extent of their obligations.[5] The threat of a large punitive award heightens concerns over the obligations and liability of a public entity under the ADA and Rehabilitation Act. As with unions in *Foust*, the threat of a future punitive award may compel a municipality's decision makers to undertake obligations far exceeding those required by the ADA or Rehabilitation Act. Notwithstanding the benefits that would accrue to a limited group of plaintiffs, such

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[5] The constitutional proscription against vague laws is "a basic principle of due process." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Within this doctrine is the idea that persons of ordinary intelligence should have a reasonable opportunity to know what is prohibited and that the standards should be clear enough to curb the danger of arbitrary or discriminatory enforcement. *Id.* at 109.

excess would come at the expense of other municipal programs and services. Indeed, a substantial punitive award (such as the $1.2 million in the instant case) or a settlement entered into in avoidance of the possibility of such an award, would provide a windfall to a single disabled individual. That expenditure would necessarily compel a reduction or termination of the very programs, services and activities that the municipality would otherwise provide to all of its residents, including its disabled residents, in accordance with the ADA and Rehabilitation Act.

The experience of the City of Sacramento in attempting to discern its obligations under the ADA and the Rehabilitation Act and the potential impact of a punitive damages remedy is illustrative, and undoubtedly not unusual. Sacramento has been subjected to claims that its sidewalks are "programs" under the ADA and Rehabilitation Act, imposing on the city an obligation to cure excessive cross slopes, obstructions in the path of travel (signs, poles, grates, etc.), narrow widths and broken concrete (in many instances caused by tree roots). As in many American cities, Sacramento's infrastructure dates from the mid-nineteenth century and includes a substantial length of sidewalks.

In recent years, Sacramento has dedicated substantial funds to construction of curb ramps and other improvements for sidewalk accessibility. Concerned about the breadth of ADA and Rehabilitation Act requirements and the possible judicial imposition of a financially debilitating obligation, the city has also tried, without much success, to negotiate a resolution. If the city must negotiate under the added threat of punitive damages, the city will

feel pressure to budget substantial financial resources for sidewalk improvements that ultimately may not be required by the ADA or the Rehabilitation Act. The threat of punitive damages would skew the city budget by reducing funds available for all other city programs and services, all to the detriment of its residents.

Obviously, the threat of punitive damages awards compounds the uncertainty that public entities are experiencing with respect to their obligations under Title II of the ADA and the Rehabilitation Act. Municipalities exist for the benefit of and have obligations to serve all of their residents, including the disabled. The threat of punitive damages awards, coupled with the broad scope of the ADA and the Rehabilitation Act, creates a high risk that a single, relatively small group will receive funding, activities, programs and services well in excess of what the law requires, at the expense of all of the municipality's residents, and undermining the municipality's ability to provide even basic municipal services.

III.

CONCLUSION

The Eighth Circuit's decision to let stand an award of punitive damages against a municipality under the ADA and the Rehabilitation Act utterly disregards the weight of precedent established by this Court, considerable existing legislative history and centuries of common law to the contrary. As the Court concluded in *City of Newport*,

> [C]onsiderations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

City of Newport, 453 U.S. at 271. The *City of Newport* rationale is not limited to § 1983, in that it reflects both the common law and the body of modern jurisprudence. It applies equally to claims under the ADA and the Rehabilitation Act. The decision of the Eighth Circuit should be reversed.

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